# Solid Kitchen Sdn Bhd v Aman Teguh-WICC JV Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–439 OF 1996
RAMLY ALI J
27 JANUARY 2003

***Contract*** *— Accord and satisfaction — In discharge of an obligation — Whether promise of substituted obligation amounted to satisfaction — Whether plaintiff agreed to accept promise of performance of contra arrangement as satisfaction instead of its actual performance*

***Contract*** *— Breach — Claims for sums provided in agreement — Whether the first defendant had rightly terminated the contra arrangement — Whether the first defendant was liable to pay the plaintiff damages*

***Contract*** *— Terms — Oral representations — Interest rate not evidenced in writing — Whether plaintiff could impose rate of 2% per month for late payment of contract sum*

***Evidence*** *— Presumption — Evidence Act 1950, s 114 — Failure to call material witnesses — Whether it gave rise to irresistible inference that, if called, their evidence would be unfavourable — Evidence Act 1950 s 114(g)*

The first defendant was the developer of a condominium project. The second defendant was the project manager/main contractor for the said project. The second defendant awarded to the plaintiff a contract for certain works in relation to the project ('the original contract'). The contract sum under the original contract was to be paid progressively, and in particular a deposit equivalent to 30% of the contract sum was to be paid upon acceptance of the original contract. However, upon completion of the original contract, the second defendant failed to pay the progressive payments as agreed, apart from the 30% deposit. During the course of the original contract, the plaintiff, the first defendant and the second defendant came to an arrangement whereby the first defendant offered to the plaintiff certain units of the condominium (namely units CGO-9, CGO-10, CGO-11 and CGO-12), payment for which would be made by setting off the price against the contract sum ('the contra arrangement'). Only the purchase price of CGO-11 was eventually paid to the plaintiff to set off against the contract sum. The purchase price for CGO-9 was paid directly to the first defendant, whilst CGO-10 was repurchased and CGO-12 taken back by the first defendant. In the meantime, the plaintiff had incurred expenses on interior furnishings for unit CGO-12 and renovation works for unit CGO-10. The plaintiff claimed damages from both the defendants consisting of the contract sum, costs of additional works, costs of interior furnishings for unit CGO-12, loss of increased value of unit CGO-10 and interest for late payment of the contract sum at 2% per month. The second defendant raised the defence of 'accord and satisfaction', claiming that it was agreed between the parties that the first defendant would pay on

behalf of the second defendant any amount due to the plaintiff by allowing the plaintiff to set off the amount through the purchase of the units offered by the first defendant under the contra arrangement. The second defendant also sought for the return of the deposit paid earlier to the plaintiff and denied that interest for late payment had been set at 2% per month. The first defendant argued that the plaintiff did not accept the first defendant's offer for unit CGO-10 and therefore the offer was withdrawn. The first defendant also contended that the first defendant had rightly terminated the arrangement in respect of unit CGO-12 and was therefore not liable to pay the plaintiff as claimed. Further, the first defendant contended that it was never agreed, as alleged by the plaintiff, that the first defendant would repurchase any of the units offered to the plaintiff at the market price if the plaintiff could not affect a sale to a third party.

**Held**:

(1) The second defendant was liable to pay the plaintiff the balance of the contract sum, taking into account the 30% deposit and the proceeds of the sale of unit CGO-11 under the contra arrangement which had been paid to the plaintiff. The second defendant's original liability to pay the plaintiff the contract sum was not at any time discharged by the contra arrangement, there being no evidence to that effect. The contra arrangement was another business transaction for profit, which was separate from the original contract awarded to the plaintiff by the second defendant. The issue of setting off payment for the contract sum was only incidental to the subject matter of the contra arrangement. DW1, a manager of the second defendant, had in fact agreed during cross-examination that the second defendant's liability to pay the contract sum would remain until the contra arrangement was fully completed (see pp 423F, 426A–B, 432D–E).

(2) The defence of accord and satisfaction as raised by the second defendant was not applicable to the facts of the present case. The plaintiff only agreed to accept the actual performance of the contra arrangement, and not merely the promise of its performance, as satisfaction of the second defendant's obligation under the original contract. The undisputed evidence of PW1 was that the contra arrangement would only be deemed successful if it involved all the units offered and accepted in the arrangement, and not just one or two units. In the present case, as the contra arrangement was not completed, there was no satisfaction (see p 426D–F).

(3) The first defendant was liable to pay the plaintiff for matters relating to the contra arrangement, ie interior furnishings for unit CGO-12, renovation works for unit CGO-10 and loss of the increase in value of unit CGO-10. The contra arrangement was a separate transaction between the plaintiff and the first defendant,

and the second defendant could not be held responsible for the first defendant's failure to fulfill its part of the bargain thereunder. The first defendant breached the contra arrangement when it took back units CGO-10 and CGO-12 before the plaintiff could get buyers for them. Based on PW1's uncontroverted evidence, it was a term of the contra arrangement that the first defendant could only cancel or re-acquire any of the units offered if the plaintiff expressly informed the first defendant that it could not secure any buyer and did not want the unit anymore. Another term of the arrangement was that if the first defendant cancelled or sold the unit to somebody else without the plaintiff's consent, the first defendant would have to pay the plaintiff at the market price so as to reimburse the plaintiff for the renovation (see pp 426H–I, 427F–I).

(4) The first defendant's defence as contained in its statement of defence remained as bare allegations, unsubstantiated by evidence. The first defendant chose not to call any witnesses to prove its case as pleaded. Counsel for the first defendant attended court during trial to cross-examine PW1 but PW1's evidence was not affected. DW1's evidence (the only witness for the second defendant) did not further the first defendant's case, particularly relating to the issue of the contra arrangement. The first defendant failed to call its director and marketing manager who represented the first defendant throughout the negotiations for the contra arrangement and no explanation was offered for such failure. The irresistible inference, invoking the presumption under s 114(g) of the Evidence Act 1950, would be that if they were called, their evidence would be unfavourable to the first defendant (see pp 425F, 426A–D, 427D–F).

(5) The plaintiff was not entitled to late payment interest of 2% per month on the contract sum. The said interest must have been clearly and expressly agreed upon by the parties and proved to the satisfaction of the court. The plaintiff failed to do so. DW1, who was present at the discussions in relation to the contra arrangement, confirmed that there was no agreement as to the imposition of 2% per month as late payment interest. There was no such agreement in writing between the parties and the amount resulting from this rate of interest was too substantial not to be put in writing. The excuse given by PW1 that he stood by what he said and by trust was not acceptable since PW1 himself issued a letter confirming the terms and conditions of the contra arrangement; the letter, however, did not show any agreement as to the interest for late payment. There was also no mention of the issue throughout the correspondence between the plaintiff and the defendants. However, the plaintiff was entitled to the usual interest at 8%pa from the date when the works were completed to the date of full realization, even if it was not so stated in writing between the parties (see pp 428F, H–429C); *Wallersteiner v Moir*

*(No 2)* [1975 1 All ER 849 and *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 followed.

(6) The second defendant's counterclaim against the plaintiff was dismissed with costs and the deposit sum did not need to be returned to the second defendant. The said deposit was part of the initial payment under the contract sum to be paid by the second defendant to the plaintiff. Therefore, the plaintiff may retain the said sum as part payment (see p 432B–C).

**[Bahasa Malaysia summary**

Defendan pertama merupakan pemaju sebuah projek kondominium. Defendan kedua merupakan pengurus projek/kontraktor utama untuk projek tersebut. Defendan kedua telah memberikan plaintif satu kontrak untuk kerja-kerja tertentu berhubung dengan projek tersebut ('kontrak asal tersebut"). Jumlah kontrak di bawah kontrak asal tersebut hendaklah dibayar secara progresif, dan khususnya satu deposit sebanyak 30% daripada jumlah kontrak tersebut hendaklah dibayar setelah menerima kontrak asal tersebut. Walau bagaimanapun, setelah siap kontrak asal tersebut defendan kedua telah gagal untuk membayar pembayaran-pembayaran progresif seperti mana yang dipersetujui, selain daripada deposit sebanyak 30% tersebut. Ketika perjalanan kontrak asal, plaintif, defendan pertama dan defendan kedua telah mencapai satu persetujuan di mana defendan pertama telah menawarkan kepada plaintif unit-unit tertentu kondominium tersebut (iaitu unit-unit CGO-9, CGO-10, CGO-11 dan CGO-12), pembayaran baginya akan dibuat dengan cara menolak harganya dengan harga kontrak ('persetujuan kontra tersebut'). Hanya harga belian bagi CGO-11 telah dibayar kepada plaintif untuk ditolak terhadap jumlah kontrak tersebut. Harga belian bagi CGO-9 telah dibayar kepada defendan pertama, sementara CGO-10 pula telah dibeli semula dan CGO-12 diambil balik oleh defendan pertama. Sementara itu, plaintif telah mengalami perbelanjaan atas kelengkapan dalaman untuk unit CGO-12 dan kerja-kerja ubahsuai untuk unit CGO-10. Plaintif menuntut ganti rugi daripada kedua-dua defendan tersebut yang terdiri daripada jumlah kontrak, kos kerja-kerja tambahan, kos kelengkapan dalaman untuk unit CGO-12, kerugian kenaikan nilai unit CGO-10 dan faedah pembayaran lewat jumlah kontrak pada kadar 2% sebulan. Defendan kedua telah membangkitkan pembelaan 'persetujuan dan penyelesaian', dengan menuntut bahawa telah dipersetujui antara pihak-pihak tersebut bahawa defendan pertama akan membayar bagi pihak defendan kedua sebarang jumlah yang kena dibayar kepada plaintif dengan membenarkan plaintif menolak jumlah tersebut melalui pembelian unit-unit yang ditawarkan oleh defendan pertama di bawah perjanjian kontrak tersebut. Defendan kedua juga memohon untuk pengembalian jumlah deposit yang telah dibayar kepada plaintif dan menafikan bahawa faedah untuk pembayaran lewat telah

ditetapkan pada kadar 2% sebulan. Defendan pertama berhujah bahawa plaintif tidak menerima tawaran defendan pertama untuk unit CGO-10 dan oleh itu tawaran tersebut telah ditarik balik. Defendan pertama juga menegaskan bahawa defendan pertama telah menamatkan persetujuan berhubung dengan unit CGO-12 dengan betul dan adalah dengan itu tidak bertanggungjawab untuk membayar plaintif seperti mana yang dituntut. Selanjutnya, defendan pertama menegaskan bahawa tidak pernah dipersetujui, seperti mana yang dikatakan oleh plaintif, bahawa defendan pertama akan membeli balik mana-mana daripada unit-unit yang ditawarkan kepada plaintif pada harga pasaran jika plaintif tidak dapat melaksanakan penjualan kepada pihak ketiga.

**Diputuskan**:

(1) Defendan kedua bertanggungjawab untuk membayar plaintif baki jumlah kontrak tersebut, mengambil kira deposit sebanyak 30% dan hasil jualan CGO-11 di bawah persetujuan kontra yang telah dibayar kepada plaintif. Tanggungjawab asal defendan kedua untuk membayar plaintif jumlah kontrak tersebut telah tidak pada bila-bila masa terlepas oleh persetujuan kontra tersebut, oleh kerana tiada keterangan mengenainya. Persetujuan kontra tersebut adalah satu lagi transaksi perniagaan yang lain untuk meraih keuntungan, yang mana adalah berasingan daripada kontrak asal yang diberikan kepada plaintif oleh defendan kedua. Isu menolak pembayaran untuk jumlah kontrak tersebut adalah hanya bersampingan kepada perkara persetujuan kontra tersebut. DW1, seorang pengurus defendan kedua, telah pada hakikatnya bersetuju ketika pemeriksaan balas bahawa tanggungjawab defendan kedua untuk membayar jumlah kontrak tersebut akan kekal sehingga persetujuan kontra tersebut disempurnakan sepenuhnya (lihat ms 423F, 426A–B, 432D–E).

(2) Pembelaan persetujuan dan penyelesaian seperti mana yang dibangkitkan oleh defendan kedua tidak boleh dipakai kepada fakta-fakta kes semasa. Plaintif hanya bersetuju untuk menerima perlaksanaan sebenar persetujuan kontra tersebut, dan bukan hanya janji mengenai perlaksanaannya, sebagai penyelesaian kewajipan defendan kedua di bawah kontrak asal tersebut. Keterangan PW1 yang tidak dipertikaikan adalah bahawa persetujuan kontra tersebut akan hanya dianggap disempurnakan jika ianya melibatkan kesemua unit-unit yang ditawarkan dan diterima di dalam persetujuan tersebut, dan bukan hanya satu atau dua unit sahaja. Dalam kes semasa, oleh kerana persetujuan kontra tersebut tidak disempurnakan, maka tidak terdapat penyelesaian (lihat ms 426D–F).

(3) Defendan pertama bertanggungjawab untuk membayar plaintif bagi perkara-perkara yang berkaitan dengan persetujuan kontra, iaitu kelengkapan dalaman untuk unit CGO-12, kerja-kerja ubahsuai untuk CGO-10 dan kerugian kenaikan pada nilai unit

CGO-10. Persetujuan kontra tersebut adalah satu transaksi yang berasingan antara plaintif dan defendan pertama, dan defendan kedua tidak boleh dipertanggungjawabkan atas kegagalan defendan pertama untuk memenuhi bahagiannya di dalam persetujuan itu. Defendan pertama telah mengingkari persetujuan kontra tersebut apabila ia mengambil balik unit-unit CGO-10 dan CGO-12 sebelum plaintif sempat mendapatkan pembeli baginya. Berdasarkan keterangan PW1 yang tidak dipertikaikan, ia merupakan satu terma persetujuan kontra tersebut bahawa defendan pertama hanya boleh membatalkan atau memperoleh semula mana-mana daripada unit-unit yang ditawarkan jika plaintif dengan nyatanya memaklumkan defendan pertama bahawa ia tidak dapat mencari sebarang pembeli dan tidak lagi mahukan unit tersebut. Satu lagi terma persetujuan tersebut adalah bahawa jika defendan pertama membatalkan atau menjual unit-unit kepada orang lain tanpa kebenaran plaintif, defendan pertama perlu membayar plaintif pada harga pasaran bagi membayar balik kepada plaintif bagi kerja-kerja ubahsuai yang telah dilaksanakan (lihat ms 426H–I, 427F–I).

(4) Pembelaan defendan pertama seperti mana yang terkandung di dalam pernyataan pembelaannya kekal sebagai penegasan-penegasan kosong, yang tidak disahkan oleh keterangan. Defendan pertama memilih supaya tidak memanggil sebarang saksi untuk membuktikan kesnya seperti mana yang diplidkan. Peguam bagi pihak defendan pertama telah menghadiri mahkamah ketika perbicaraan untuk memeriksa balas PW1 tetapi keterangan PW1 tidak terjejas. Keterangan DW1 (satu-satunya saksi untuk defendan kedua) tidak melanjutkan kes defendan pertama, khususnya berkaitan isu persetujuan kontrak tersebut. Defendan pertama gagal untuk memanggil pengarah dan pengurus pemasarannya yang telah mewakili defendan pertama sepanjang perundingan-perundingan untuk perjanjian kontra tersebut dan tiada penjelasan diberikan bagi kegagalan sedemikian. Inferens yang tidak dapat dielakkan, menggunakan anggapan di bawah s 114(g) Akta Keterangan 1950, adalah bahawa jika mereka dipanggil, keterangan mereka tidak akan memihak kepada defendan pertama (lihat ms 425F, 427D–F, 426A–D).

(5) Plaintif tidak berhak kepada faedah pembayaran lewat sebanyak 2% sebulan ke atas jumlah kontrak tersebut. Faedah tersebut mestilah dipersetujui dengan jelas dan nyata oleh pihak-pihak tersebut dan dibuktikan sehingga mahkamah berpuas hati. Plaintif telah gagal untuk melakukan sedemikian. DW1, yang hadir di perbicangan berhubung persetujuan kontra tersebut, mengesahkan bahawa tidak terdapat persetujuan berhubung dengan pengenaan faedah pembayaran lewat sebanyak 2% sebulan. Tidak terdapat perjanjian bertulis sedemikian antara pihak-pihak tersebut dan jumlah hasil daripada kadar faedah ini adalah terlalu banyak untuk tidak mencatatkannya secara bertulis.

Alasan yang diberikan oleh PW1 bahawa beliau tegas dengan apa yang telah beliau perkatakan dan melalui amanah tidak dapat diterima oleh kerana PW1 sendiri telah mengeluarkan surat yang mengesahkan terma-terma dan syarat-syarat persetujuan kontrak tersebut; surat itu, walau bagaimanapun, tidak menunjukkan sebarang perjanjian berhubung dengan faedah untuk pembayaran lewat. Tiada juga sebarang sebutan mengenai isu tersebut di keseluruhan surat-menyurat antara plaintif dan defendan-defendan. Walau bagaimanapun, plaintif berhak kepada faedah biasa pada kadar 8% setahun daripada tarikh kerja-kerja tersebut disiapkan sehingga tarikh penjelasan sepenuhnya, meskipun jika ia tidak dinyatakan sedemikian secara bertulis antara pihak-pihak tersebut (lihat ms 428F, H–429C); *Wallersteiner v Moir (No 2)* [1975 1 All ER 849 dan *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 diikut.

(6) Tuntutan balas defendan kedua terhadap plaintif ditolak dengan kos dan jumlah deposit tersebut tidak perlu dikembalikan kepada defendan kedua. Deposit tersebut adalah sebahagian daripada bayaran permulaan di bawah jumlah kontrak tersebut yang harus dibayar oleh defendan kedua kepada plaintif. Oleh itu, plaintif boleh menyimpan jumlah tersebut sebagai sebahagian pembayaran (lihat ms 432B–C).

**Notes**

For cases on accord and satisfaction in discharge of an obligation, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), para 1843.

For cases on claims for sums provided in agreements, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 1970.

For cases on oral representations of terms, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 4023–4025.

For cases on the Evidence Act 1950, s 114, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 1851.

**Cases referred to**

*British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 (refd)

*Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 (refd)

*Gan Kui Lan @ Gan Kee Lan v Chia Kar Loong (No 1)* [2002] MLJU 352 (refd)

*KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (refd)

*Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99 (refd)

*Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 (refd)

*Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 (folld)

*Ng Ben Thong & Ors v Krishnan a/l Arumugam* [1998] 5 MLJ 579 (refd)

A *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 (refd)
*State Government of Perak v Muniandy* [1986] 1 MLJ 490 (refd)
*Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 (folld)

**Legislation referred to**

B Evidence Act 1950 ss 58, 114(g)

*Chin Chee Leong* (*Ong Pang Hoe* with him) (*Syarikat Radhakrishnan*) for the plaintiff.
*Chong Kah Heng* (*NK Tan & Rahim*) for the first defendant.
*Lee Han Meng* (*KT Tan & Co*) for the second defendant.

C **Ramly Ali J**:

*Brief facts*

The first defendant was the developer of a condominium project known as
D 'the proposed condominium development on Lot PT4, Persiaran Raja Chulan, Kuala Lumpur' which was also known as 'City Gardens Condominium' ('the said project').

The second defendant was the project manager/main contractor for the said project.

E The plaintiff was the sub-contractor appointed by the second defendant for the supply, delivery and installation of kitchen cabinets for 132 units of condominium for the said project ('the said contract'). The agreed original contract sum was RM514,360.

The plaintiff was also asked to carry out additional work, namely to supply three units of stainless steel sink for three penthouse units in the
F same project. The price per unit was RM280 and the installation charge was RM30 per unit. The total cost therefore was RM930.

The total sum (original contract sum of RM514,360 plus additional work of RM930) payable to the plaintiff by the second defendant was RM515,290 ('the contract sum').

G The plaintiff had completed the said contract and a certificate of practical completion dated 15 April 1994 for the said contract was issued by the architect.

The contract sum was to be paid progressively, in particular a deposit equivalent to 30% of the original contract sum amounting to RM154,308
H was to be paid upon acceptance of the said contract. Upon completion of the said contract by the plaintiff, the second defendant failed to pay the progressive payments as agreed.

During the course of the said contract, the plaintiff, the first defendant and the second defendant came to an arrangement whereby the first defendant would offer to the plaintiff certain units of condominium, and
I payment therefore would be made by setting off the price against the contract sum ('the contra arrangement'). As the amount involved in the sale of the units to the plaintiff was greater than the contract sum, it would

appear that the parties have entered into a collateral agreement, with the first and second defendants of the one part and the plaintiff of the other.

Three units were initially offered to the plaintiff at the price of RM1,050,000. The units were CGO-9, CGO-10 and CGO-11.

Another unit, CGO-12, was subsequently also offered to the plaintiff at a price of RM346,500.

The arrangement was not fully concluded due to disputes between the first defendant and the plaintiff over the balance sum payable by the plaintiff. Only two units were concluded, namely CGO-9 and CGO-11. CGO-10 and CGO12 were taken back by the first defendant. CGO-9 and CGO-11 were sold by way of sub-sale to third parties by the plaintiff. The purchase price for CGO-9 was paid directly to the first defendant. Only the purchase price of CGO-11 was used to set off against the contract sum and paid to the plaintiff.

In the mean time, the plaintiff spent RM124,509 for interior furnishings of unit CGO-12. As for unit CGO-10, it was repurchased by the first defendant at the market price of RM420,000. Renovation works for unit CGO-10 worth RM50,000 was done by the plaintiff. Consequently, the plaintiff alleged that they have suffered loss and damage. Therefore the plaintiff claimed from both the defendants:

(1) special damages amounting to RM588,074.07 (which consists of the contract sum, costs of additional works, costs of interior furnishing for unit CGO-12, loss of increased value of unit CGO-10);

(2) general damages; and

(3) interest and costs.

*Defence of first defendant*

The first defendant denied the plaintiff's claim as well as and the imposition of late payment interest/charges. The first defendant also alleged that the plaintiff's calculation of the amount payable was wrong. As for unit CGO-10, the first defendant argued that the plaintiff did not accept the first defendant's offer and therefore the offer was withdrawn by the first defendant. The first defendant also contended that it was never agreed that the first defendant would repurchase any of the units offered to the plaintiff at the market price if the sale by the plaintiff to a third party could not be affected, as alleged by the plaintiff. The first defendant also contended that the first defendant has rightly terminated the agreement in respect of unit CGO-12 and therefore is not liable to pay the plaintiff as claimed.

*Defence of second defendant*

The second defendant also denied the plaintiff's claim on the grounds that the second defendant did not owe anything to the plaintiff since it was agreed between the parties that the first defendant would pay on behalf of the second defendant any amount due to the plaintiff by allowing the plaintiff to contra/set-off the amount owing through the purchase of the

A units offered by the first defendant under the contra arrangement. The second defendant raised the defence of 'accord and satisfaction'. The second defendant also argued that the plaintiff has failed to take into account the payment of deposit (of 30% of the original contract sum) amounting to RM154,308 which has been paid by the second defendant to the plaintiff.

B

*Counterclaim by second defendant*

The second defendant counterclaimed against the plaintiff for the sum of RM154,308 (being 30% deposit) paid earlier by the second defendant to the plaintiff to be returned, interest and costs.

C

During case management, all parties agreed (as ordered by the court) that the question of liability be tried first during the trial. The issue of quantum will be dealt with at a later stage after the decision on liability has been made. Therefore, these grounds of judgment are only in respect of the issue on liability.

D

*Issues to be decided*

The following are the issues requiring determination at the trial:

(1) whether the 'contra arrangement' was binding on all the three parties;

E (2) whether the first or second defendants were liable to pay to the plaintiff as claimed;

(3) whether the plaintiff was entitled to impose late payment/interest charges on the delay of payment of the contract sum at the rate of 2% per month;

F (4) whether the plaintiff was entitled to claim the renovation costs for units CGO-10 and CGO-12;

(5) whether the plaintiff was entitled to claim losses due to the cancellation of unit CGO-10 by the first defendant;

(6) whether there was any balance contract sum payable by the defendants after taking into account the sale proceeds of unit CGO-11 which was paid to the plaintiff;

G

(7) whether the deposit sum of RM154,308 was paid by the second defendant and if so, whether the second defendant was entitled to counterclaim the said deposit sum.

H Ultimately, the crux of this case is:

(1) whether the plaintiff is entitled to claim the remedies set out under paras 25–26 of the amended statement of claim;

(2) whether the defence of 'accord and satisfaction' as raised by the second defendant is applicable; and

I (3) if the plaintiff is entitled to claim, whether the first defendant and the second defendant collectively or either of them individually should be liable.

*The contract work: Liability of the second defendant*

It is not disputed that, liability wise, the contract sum was due and payable to the plaintiff for the supply, delivery and installation of kitchen cabinets for 132 units of condominium, plus additional work to supply three units of stainless steel sink for three penthouse units. The said contract sum should be paid progressively. The plaintiff commenced works in November 1993 and completed them sometime in April 1994. There was a meeting between the plaintiff; one Mr Syukur Suyardi (a director of the first defendant); one Mr Lim Chin Hock (DW1 — a manager of the second defendant) and one Mr Yap Way Meng (a marketing manager of the first defendant) sometime on 30 November 1993, whereby the plaintiff was told that the first defendant might encounter difficulties in selling the condominium units and their cash flow would be affected. The first defendant suggested that the plaintiff help the first defendant to sell certain units especially the ground floor units which were not so popular. The arrangement was that the plaintiff would purchase the units from the first defendant and then sell them to sub-buyers. The purchase price from the sub-sales would be used to set off the contract sum which was due and payable. Certain units would be allocated to the plaintiff at cost price. The plaintiff would upgrade the units by carrying out renovations thereto and sell them at higher prices, which are the market prices. The difference between the market price and the cost price would be retained by the plaintiff as payment for the renovations. It was made clear that the plaintiff would never have to use its own money for the purchase of the units. It was finally agreed that the first defendant initially offered the plaintiff three units at a total cost price of RM1,050,000. The units were CGO-9, CGO-10 and CGO-11. Another unit, CGO-12, was subsequently added at a price of RM346,500. It was not disputed that the parties have agreed that the first defendant can only cancel or re-acquire any of the units if the plaintiff expressly informs the first defendant that they cannot secure any sub-buyer and does not want the unit anymore. It was not disputed that if the first defendant cancels or sells the unit to somebody else without the plaintiff's consent, the first defendant would have to pay the plaintiff the market price so as to reimburse the plaintiff for the renovation cost.

In the present case, the plaintiff's claims against the two defendants are based on two separate transactions, namely:

(1) the original contract work for the supply, delivery and installation of kitchen cabinets for 132 units of condominium (plus three units of stainless steel sink for three penthouse units); and

(2) the 'contra arrangement' involving the purchase of four units of condominium by the plaintiff from the first defendant.

In respect of the original contract work, it is not disputed that the relevant parties to the transaction were the plaintiff and the second defendant. The evidence of DW1 (manager of the second defendant) confirmed that the first defendant was the developer of the said project and the second defendant was the turnkey contractor for the said project. DW1 also

confirmed that the plaintiff was the sub-contractor appointed by the second defendant vide a letter dated 10 September 1993 through their consultant architect. PW1 (managing director of the plaintiff) also confirmed that he came to know about the said project through one architect firm — Akitek Ata Reka, who was involved as a consultant in the said project. He was asked whether he was interested to get a contract to supply and install kitchen cabinets in the said project. PW1 later submitted the plaintiff's quotations and later the said contract work was awarded by the second defendant to the plaintiff for a contract sum of RM514,360. DW1 claimed that the second defendant paid RM154,308 to the plaintiff as deposit (being 30% of the contract sum of RM514,360). Throughout his evidence, DW1 (being the only witness for the second defendant) did not dispute their liability to the plaintiff in respect of the original contract works. However, the second defendant's defence is based on their understanding that their liability to the plaintiff was taken over by the first defendant and thus immediately extinguished upon acceptance of the contra arrangement by the plaintiff.

There is no evidence to show that the first defendant was involved in the first transaction between the plaintiff and the second defendant. Even though the first defendant was the developer of the said project, the part played by the second defendant, in the turnkey project, was purely an independent act which did not bind the first defendant. The transaction in the engagement of the plaintiff in the said contract work was between the second defendant and the plaintiff. The second defendant (through DW1 in his cross-examination) agreed that there was no agreement to the effect that the said contract sum would be payable by the first defendant. DW1 also confirmed that there was no agreement that the second defendant would not be responsible for paying the said contract sum to the plaintiff. DW1 also testified that the second defendant was liable to pay the plaintiff as the work progressed. DW1 also agreed (during cross-examination) that the second defendant's liability to pay the contract sum would remain until the contra arrangement was fully completed.

*Defence of accord and satisfaction and the contra arrangement*

The second defendant contended that the liability to pay the contract sum by the second defendant to the plaintiff had been taken over by the first defendant under the said contra arrangement and the mode of payment by the first defendant was by way of contra of properties (the four units); and as such, the second defendant has a good defence of 'accord and satisfaction'. What is meant by 'accord and satisfaction'? Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, described aptly the defence of 'accord and satisfaction' at p 643 as follows:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The *accord* is the agreement by which the obligation is discharged. The *satisfaction* is the consideration which makes the agreement operative. (Emphasis added.)

In *Gan Kui Lan @ Gan Kee Lan v Chia Kar Loong (No 1)* [2002] MLJU 352, Abdul Malik Ishak J quoted the above passage at p 15 and went on to consider the same defence. At p 15, his Lordship says the following: A

> There is no necessity, at all, that the consideration should be executed; the consideration on each side might even be in the category of an executory promise. B

The second defendant is suggesting that in the present case, the first defendant has, in the said contra arrangement, agreed or promised to settle the contract sum by way of contra payment involving the four units of condominium to be sold to the plaintiff. The satisfaction is an executory promise and should be treated as good satisfaction even though it had not been fully executed yet. C

Therefore, the second defendant argued that such an executory promise is sufficient to discharge the second defendant from their liability to pay the plaintiff once the contra arrangement was agreed upon.

The court has reservations in what the second defendant was trying to suggest. The question of whether an executory satisfaction is sufficient to discharge the original obligation depends entirely upon the construction of the contract or arrangement. *Halsbury's Law of England* (4th Ed, Vol 9) para 588, states as follows: D

> It is clear that whether executory satisfaction is sufficient to discharge the original obligation depends entirely upon the construction of the contract, though in the older cases such satisfaction was never considered sufficient. Thus, a creditor may agree to accept as satisfaction the promise of the substituted obligation; or he may agree to accept only the actual performance of the substituted obligation. In the former case the original obligation will be discharged from the moment of the new agreement; in the latter case it will not be discharged until the substituted obligation has been performed. E F

The approach the court should take whether there has been 'accord and satisfaction' both in law and fact is well settled and the best exposition of it appears in Roskill J's judgment in *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at p 318:

> Where the question arises whether a particular obligation has been performed, the first thing that has to be done is to ascertain the nature of the obligation. That depends on the construction of the contract, and the construction of the contract is, of course, a question of law; but that is only one part of the equation. Having ascertained what the obligation is, one then has to measure the performance, and see whether the performance fulfils the obligation. That again ultimately is either a question of law or a question of mixed fact and law; not perhaps in every case, but in a great many cases. G H

The above passage was quoted and followed by the Singapore High Court in *Lee Kuan Yew v Scow Khee Leng* [1986] 1 MLJ xi where it was held:

> The importance of ascertaining the exact terms of compromise or 'obligation', as Roskill J puts it, is that it determines the question of whether or not the plaintiff can rely on his original cause of action. If, for instance, the promised or actual forbearance to pursue the claim is construed as being in return for I

> the *promised performance* of some act by the other, or whom I would call the offending party, the agreement will be regarded as one involving the immediate discharge of the claim. But if the promised or actual forbearance is construed as being in return for *actual performance* of some act by the offending party, the claim forborne will not be discharged until such performance takes place, (see, *British Russian Gazette*'s case, supra); and if in this respect the offending party fails to perform the terms of the compromise, the other party has an option to either accept the offending party's repudiation of the compromise and re-assert his original claim or affirm the compromise and sue upon it.

In the present case, according to PW1, the so-called contra arrangement was first suggested by the representatives of the first defendant during the meeting on 30 November 1993 whereby the plaintiff was asked to help the first defendant to sell certain units of the condominium especially the ground floor units which were not so popular, as the first defendant might encounter difficulties in selling the condominium units and their cash flow would be affected. Then they also suggested the possibility of setting off or to contra the contract sum with the condominium units. Originally, three units were offered to the plaintiff, later another unit was offered. The plaintiff accepted the offer because PW1 was told by the representatives of the first defendant at the meeting that there would be further contracts to be awarded to the plaintiff in the said project if the plaintiff agrees to accept the arrangement. The units were supposed to be sold to the plaintiff at cost price and the plaintiff was supposed to upgrade the units by way of renovation and later to sell them at a higher market price. It was also agreed that the difference between the market price and the cost price would go to the plaintiff.

The said contra arrangement was mainly between the plaintiff and the first defendant through their representatives, En Syukur Suyardi and Mr Yap Way Meng. DW1, the manager of the second defendant, although present during the meeting, played no active role. During re-examination, DW1 confirmed that during the meeting between the first defendant and the plaintiff, the second defendant had no say in it. The first defendant chose not to call any witnesses during trial. The said En Syukur Suyardi and Mr Yap Way Meng were not even called as witnesses. There was no reason given why they were not called. The learned counsel for the first defendant informed the court that he would not be calling any witnesses. Both the said En Syukur Suyardi and Mr Yap Way Meng are material and relevant to the present proceedings, especially relating to the issue of the contra arrangement, its terms and conditions, as well as what actually transpired during the said meeting. Under such circumstances, the court is of the view that the presumption under s 114(g) of the Evidence Act 1950, ie that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, is applicable and can be invoked against the first defendant in the present case.

Back to the said contra arrangement, there is no evidence to show that it was meant to discharge the liability of the second defendant in respect of their original liability under the original contract of works. In fact, during cross-examination by the plaintiff's counsel, DW1 agreed that the second

defendant's liability to pay the contract sum would remain until the contra arrangement is fully completed. The main subject matter of the said contra arrangement is about the sale of the units of condominium to the plaintiff at cost price and the plaintiff was to do some renovation to those units and later resell them to third parties at higher market prices and to retain the difference between the market price and the cost price. It was another business transaction for profit, which was separate from the original contract work awarded to the plaintiff by the second defendant. The issue of setting off payment for the contract sum was only incidental to the subject matter of the contra arrangement. The undisputed evidence of PW1 clearly shows that the second defendant's original liability to pay the plaintiff on the contract sum was not at any time discharged by the contra arrangement. Therefore, the plaintiff's original cause of action against the second defendant was still unchanged. If the said contra arrangement failed to materialize, as in the present case, then the plaintiff has an option to assert his original claim against the second defendant.

PW1's evidence as to the terms of the contra arrangement which was not challenged, was that for the contra arrangement to have been fully executed or concluded or deemed successful it must have involved all the units offered and accepted in the arrangement, and not just one or two units. Hence, it is undisputed that the plaintiff only agreed to accept the actual performance of the arrangement as substituted obligation as satisfaction and not merely the promise of the substituted obligation as satisfaction. In the present case, as the contra arrangement was not completed or not concluded, therefore, there was no satisfaction. An 'accord' without 'satisfaction' does not discharge the liability of the second defendant towards the plaintiff. Greer LJ in *British Russian Gazette* held, at p 650, that:

> I think it is still the law that a mere accord without satisfaction does not put an end to an existing liability after breach.

On the above premise, the court is convinced that the defence of accord and satisfaction as raised by the second defendant is not applicable to the facts of the present case. Therefore, the court finds that the second defendant is still liable to pay the plaintiff the contract sum (original contract sum of RM514,360 plus RM930 for additional works) minus the 30% deposit of RM154,308 which was paid by the second defendant to the plaintiff and also minus the proceeds of the sale of unit CGO-11 which the plaintiff admitted in his evidence has been paid to him under the contra arrangement.

*Contra arrangement: Liability of the first defendant*

As has been said earlier, the said contra arrangement was a separate transaction between the plaintiff and the first defendant where the second defendant, as admitted by DW1, had no say in it. Therefore, the second defendant cannot be held responsible under the said contra arrangement when the first defendant failed to fulfill their part of the bargain thereunder. Therefore, the plaintiff's claims for costs of interior furnishings and

renovations for the units of condominium involved in the said contra arrangement, as well as loss of the increased value of the units (particularly unit CGO-10 and CGO-12) should be directed against the first defendant, and not the second defendant.

In the present case, the first defendant chose not to call any witnesses to prove their case as pleaded in their statement of defence. Their counsel attended court during trial to cross-examine PW1. PW1's evidence was not shattered by his cross-examination. DW1's evidence (the only witness for the second defendant) did not help much as far as the first defendant was concerned, particularly relating to the issue of the contra arrangement. The court also invoked the presumption under s 114(g) of the Evidence Act 1950 against the first defendant for failure to call their director, En Syukur Suyardi and their marketing manager, Mr Yap Way Meng who represented the first defendant throughout the negotiations for the contra arrangement. Not only was En Syukur and Mr Yap not called, no explanation was given by the first defendant as to the non-availability of both. The irresistible inference would be that if they were called, their evidence would be unfavourable to the first defendant (see *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303.

That being the case, the first defendant's defence as contained in the statement of defence remained as bare allegations, unsubstantiated by evidence. Pleadings are not evidence. They are bare averments of a party's case. The first defendant has to adduce evidence to substantiate their pleadings. In the circumstances, the first defendant's defence remained as bare allegations (see *Ng Ben Thong & Ors v Krishnan a/l Arumugam* [1998] 5 MLJ 579). Worse still, the learned counsel for the first defendant, after attending the trial and after having cross-examined PW1, failed to submit his written submissions on behalf of the first defendant at the end of the trial despite being asked to do so by the court. Therefore, based on the evidence available, the court has no hesitation to hold that the first defendant was in breach of the said contra arrangement when they took back the units (CGO-10 and CGO-12) before the plaintiff could get buyers for them. It was a term of the contra arrangement based on PW1's evidence that the defendant could only cancel or re-acquire any of the units offered if the plaintiff expressly informed the first defendant that it could not secure any buyer and did not want the units anymore. It was also agreed based on PW1's evidence that during the said meeting held on 30 November 1993, if the first defendant cancelled or sold the unit to somebody else without the plaintiff's consent, the first defendant would have to pay the plaintiff at the market price so as to reimburse the plaintiff for the renovations. As a result of such breaches by the first defendant, the plaintiff suffered loss and damage. Therefore, the court is satisfied and holds that the first defendant was liable to pay the plaintiff as claimed in the statement of claim — on the matter relating to the contra arrangement relating to the interior furnishings for unit CGO-12, loss of the increased value of unit CGO-10 and renovation works on the units as listed under para 25 of the statement of claim. It is not disputed that the plaintiff had carried out renovations as well

as interior furnishing on units CGO-10 and CGO-12 to enhance their prospects for sale pursuant to the contra arrangement. PW1 had testified that in order for the plaintiff to sell certain units of condominium which were not so popular, it was required that the plaintiff would have to upgrade the units by carrying out renovations. Units CGO-10 and CGO-12 were taken back by the first defendant. The plaintiff had expended money to carry out works for renovation and interior furnishings. Since the contra arrangement did not go through, the plaintiff should be compensated for loss and damage incurred for those works. The first defendant had the enjoyment of the enhanced value of the said units.

*Late payment interest*

On the question of late payment interest, the plaintiff contended that they were entitled to impose 2% interest per month for the delay in payment of the contract sum. The contract sum was to be paid progressively. The issue of late payment interest was not provided for in writing. According to PW1, the issue was brought up in the discussions between the parties and PW1 had maintained that the defendants had agreed to pay the said interest at 2% per month should there be delay in the payment of the contract sum. The plaintiff also contended that there was no necessity to put such agreement in writing as it was a normal business practice. When put by the second defendant's counsel that the amount of late payment interest was so important that it should be recorded down in writing, PW1 replied:

> I don't agree because being Chinese businessmen we standby what we say, by trust.

The court observed that the issue relating to late payment interest was only applicable to the contract sum, which was the liability of the second defendant to pay to the plaintiff. DW1, on behalf of the second defendant, had rebutted PW1's evidence on this issue. According to DW1, he was present at the said discussions mentioned by the plaintiff and confirmed that there was no agreement as to the imposition of 2% per month as late payment interest. The court finds that there is other evidence available which directly or indirectly support DW1's testimony on this issue. It is not disputed that there was no such agreement in writing between the parties. The plaintiff merely states that it was normal business practice without producing any evidence to support the same. The plaintiff had claimed that they have put the terms of the contra arrangement in their letter dated 4 January 1994 (at p 5, 1D), but clearly the said letter does not show any agreement as to the interest at all. The interest claimed by the plaintiff according to the amended statement of claim is RM171,274.57 (as at 30 June 1995) and continuing at RM75,400.21pa. This means an addition of about RM565,501.60 to date, bringing the total to RM736,776.17. This exorbitantly high amount of interest is highly unlikely to be agreed between the parties. The amount is too substantial not to be put in writing. The excuse given by PW1 that he stands by what he says and by trust is not acceptable especially since PW1 himself issued the said letter dated 4 January 1994 confirming the terms and conditions of the contra

A arrangement in writing instead of trusting the first defendant. There was also no evidence that the plaintiff had sent reminders to the defendants as to the amount of interest on late payment. Throughout the correspondence between the plaintiff and the defendants, there was no mention of the issue. It was until the disputes between the plaintiff and the first defendant arose that only then did the plaintiff claim such interest vide their letter of demand B dated 19 July 1995 against the first defendant (p 68 1D). No demand was ever made against the second defendant.

On the balance of probabilities, the court is of the view that the plaintiff is not entitled to the said late payment interest of 2% per month on the contract sum as claimed by the plaintiff. The said interest must be clearly C and expressly agreed upon by the parties. It must be proved to the satisfaction of the court. The plaintiff has failed to do so. However, it does not mean that the plaintiff is not entitled to any interest at all. In this case, the plaintiff had been wrongfully deprived of the balance of the contract sum far too long and thus should be entitled to some interest, ie the usual interest at 8%pa, even if it was not so stated in writing between the parties. D As Lord Denning MR said in *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, at p 855:

> ... in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position — who has misapplied the money and made use of it himself E for his own benefit.

Again, in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353, Chong Siew Fai CJ (Sabah & Sarawak) ruled at p 385 that:

> In my view it is only fair that interest be awarded against the person who wrongfully deprives another from the use of the latter's money. In the instant F case, the landowner should be compensated for the loss thereby occasioned to them. Mere replacement of the money after more than a decade is insufficient compensation. The landowner should be compensated by an award of interest.

In the same case, his Lordship, at p 386, made the following order:

G > There shall be interest on RM22,499,750.22 at 8%pa from 10 December 1984 (date of deduction by the developer as per letter in appeal record Vol 3 at p 1181) till the date of realization.

In our present case, the plaintiff's works under the original contract was completed sometime in April 1994. The original contract sum agreed H between the plaintiff and the second defendant was RM514,360. There is evidence to show that the second defendant has paid a sum of RM154,308, being 30% of the deposit, to the plaintiff. There is also evidence, as admitted by the plaintiff, to show that the proceeds of the sale of the unit CGO-11 was paid to the plaintiff as part payment for the contract sum. Therefore, following the principle laid down in the above authorities, the I court orders that there shall be interest on the balance of the contract sum at 8%pa from April 1994 (the date when the works were completed) until the date of full realization, after taking into consideration the time and the

amounts in respect of the two payments which have been made to the plaintiff earlier.

*Oral application to amend the statement of claim*

The plaintiff's counsel at the outset of the trial attempted to make an oral application to have para 6 of the statement of claim deleted. The said para 6 states:

> Defendan kedua hanya membayar deposit awal tersebut kepada plaintif pada atau sekitar bulan Mac 1994.

The counsel for the second defendant objected to the application on the ground that the second defendant was taken by surprise as the counterclaim of the second defendant is based on the admission of the plaintiff's receipt of the deposit. The second defendant also argued that the plaintiff had failed to amend the said para 6 even though they have amended their pleadings once on 16 December 1997. The said para 6 was amended once on 16 December 1997 when the word 'kedua' (referring to the second defendant) was inserted. There was no indication at all at that time that the plaintiff intended to delete the said para 6.

The plaintiff's intention to amend the pleadings orally at this stage of the proceedings is not sufficient to justify the departure from the pleadings. The plaintiff's counsel was fully aware of the need to amend the pleadings but failed to make a formal application to do so. To accept the argument of the plaintiff that the defendants had notice of the intention to amend the statement of claim would mean that an oral conversation or a letter giving notice of the intention would suffice to dispense with the need to amend the pleadings by proper application. This will make a mockery of the rules of pleadings.

The court agrees with the second defendant's counsel that the second defendant was taken by surprise as the counterclaim of the second defendant against the plaintiff is based entirely on the admission of the plaintiff's receipt of the deposit as clearly admitted in the said para 6 of the statement of claim. If the application is granted and para 6 is deleted, the second defendant would be misled, prejudiced, embarrassed or led astray at the very last minute before the trial started. The second defendant has to search and gather new evidence in order to prove the facts which have been admitted earlier. The court will not allow such an application under such circumstances (see *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124). It has been held by Raja Azlan Shah CJ (Malaya) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, at p 12, that 'one of the objects of modern pleadings is to prevent surprise'.

In deciding whether to grant or refuse the said application by the plaintiff to delete para 6 of the statement of claim, the court is entitled to consider it having regard to other parts of the pleadings as well as the evidence and to decide it in a manner as was just between the parties. Actually, the payment of the deposit, as clearly admitted by the plaintiff in para 6, is a non-issue as the plaintiff's own pleadings have pleaded the said payment. Paragraph 5 of the statement of claim reads as follows:

> Seterusnya adalah dipersetujui di antara pihak-pihak bahawa sebaik pengesahan diberikan di atas pesanan defendan kedua, defendan kedua akan membayar kepada plaintif deposit sebanyak 30% daripada harga kontrak asal RM514,360 yang berjumlah RM154,308.

Then the second defendant admitted the payment of the said deposit in para 5 of the statement of defence:

> Sebagai jawapan kepada perenggan 6 penyata tuntutan terpinda, defendan kedua mengakui pembayaran ke atas jumlah RM154,308 (selepas ini dirujuk sebagai 'Bayaran Deposit').

In para 10 of the statement of defence, the second defendant averred that:

> Kesemua pihak telah gagal mengambilkira pembayaran deposit sebanyak RM154,308 oleh defendan kedua kepada plaintif dan telah secara silap mengenai jumlah terhutang sebagai RM514,360.

In effect, what the second defendant is saying is that in coming to the amount of the contract sum, RM514,360, the plaintiff had not taken into account the deposit of RM154,308 which had been paid by the second defendant to the plaintiff. The plaintiff then filed their reply, where at para 2 thereof it states:

> Merujuk kepada perenggan 10 penyata pembelaan defendan kedua, plaintif menafikan bahawa jumlah bayaran sebahagian sebanyak RM154,308 tidak diambilkira oleh pihak-pihak dan *memang sudah diambilkira oleh plaintif di dalam mentaksirkan kerugian dan kehilangan yang dialami oleh plaintif.* (Emphasis added.)

Therefore, it is an admitted fact in the plaintiff's pleadings that the plaintiff had received the deposit from the second defendant and had taken into consideration the said amount in calculating the contract sum. Under such circumstances, the court has to refuse or to reject the plaintiff's oral application to delete para 6 of the statement of claim. Even if para 6 is deleted, there are other provisions in the pleadings which show that the deposit has been paid by the second defendant and the plaintiff has taken into account the deposit in calculating the amount to be claimed under the contract sum. It is trite law and a rule of pleadings that parties are bound by their own pleadings (see *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99 and *State Government of Perak v Muniandy* [1986] 1 MLJ 490). Evidence cannot be led outside the pleadings. Therefore, the plaintiff's evidence in court that the said deposit has not been paid is clearly outside the pleadings and therefore cannot stand.

*The second defendant's counterclaim*

The second defendant's counterclaim relies on the fact that the deposit sum of RM154,308, being 30% of the value of the contract sum, has been paid to and received by the plaintiff. The plaintiff's pleadings seem to admit the fact that the plaintiff has received the deposit. The plaintiff's oral application to delete para 6 of the statement of claim has been rejected. Therefore, para 6 and all other relevant provisions of the pleadings stand. That being the case, the plaintiff is not allowed to adduce evidence in court

that the said deposit sum has not been paid yet. The second defendant, on the other hand need not prove the fact because it has been admitted by the plaintiff in their pleadings. In civil proceedings, no fact needs to be proved which by any rule of pleadings in force at the time, they are deemed to have been admitted by the pleadings (see s 58 of the Evidence Act 1950). Therefore, the court concludes that the said deposit amount has been paid to the plaintiff by the second defendant.

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However, the said deposit sum need not be returned to the second defendant as prayed in their counterclaim. The said deposit was part of the initial payment under the contract sum to be paid by the second defendant to the plaintiff. Therefore, the plaintiff may retain the said sum as part payment. However, it must be taken into account or deducted in calculating the balance of the contract sum that is still outstanding and needs to be paid by the second defendant to the plaintiff. Under such circumstances, the court finds that the second defendant's counterclaim against the plaintiff be dismissed with costs.

C

D

*Conclusion*

In summary, the court's decisions (on the issue of the liability) are as follows:

(1) the second defendant is liable to pay the plaintiff the balance of the contract sum (ie the original contract sum of RM514,360 plus RM930 for additional work) minus the 30% deposit of RM154,308 which was paid to the plaintiff and minus the proceeds of the sale of unit CGO-11 which the plaintiff admitted has been paid to them under the contra arrangement;

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(2) the first defendant is liable to pay the plaintiff on matters relating to the contra arrangement, ie interior furnishings for unit CGO-12; renovation works for unit CGO-10 and loss of increased value of unit CGO-10 — as listed under para 25 of the statement of claim;

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(3) the plaintiff's claim for late payment interest at the rate of 2% per month on the contract sum is dismissed. However, the second defendant is liable to pay the plaintiff the usual interest at the rate of 8%pa on the balance of the contract sum that remaines unpaid from April 1994 (when the contract work was completed) until the date of full realization;

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(4) both the defendants are to pay costs to the plaintiff — to be taxed by the registrar;

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(5) the second defendant's counterclaim against the plaintiff is dismissed with costs.

*Order accordingly.*

Reported by Joel Ng

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